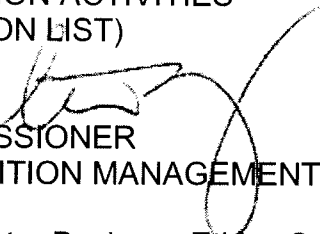


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August 8, 2009

FAS INSTRUCTIONAL LETTER 2009-06**MEMORANDUM FOR ALL FAS ACQUISITION ACTIVITIES
(QV DISTRIBUTION LIST)**

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OFFICE OF ACQUISITION MANAGEMENT (QV)

SUBJECT: Application of Contractor Business Ethics Compliance Program and Disclosure Requirements to the Federal Supply Schedule (FSS) Program

1. Purpose. The purpose of this Instructional Letter (IL) is to provide guidance on the applicability and implementation of the Contractor Business Ethics Compliance Program and Disclosure Requirements, pursuant to Federal Acquisition Circular (FAC) 2005-28 and the Close the Contractor Fraud Loophole Act (Pub. L. 110-252, Title VI, Chapter 1).
2. Background. On June 30, 2008, the Close the Contract Fraud Loophole Act was enacted as part of the Supplemental Appropriations Act of 2008. The Act required revisions to the Federal Acquisition Regulation (FAR) to require, in part:

timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.

The statute also defines a covered contract to mean "any contract in an amount greater than \$5,000,000 and more than 120 days in duration."

On November 12, 2008, FAR Case 2007-006 was published as a final rule ("Contractor Business Ethics Compliance Program and Disclosure Requirements", 73 FR 67064). This final rule, with an effective date of December 12, 2008, amended the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of Federal criminal law, violations of the civil False Claims Act, or significant overpayments. The final rule also prescribed a new clause, 52.203-13, Contractor Code of Business Ethics and Conduct, to effectively implement the statute.

The rule requires, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, the following:

- Establish and maintain specific internal controls to detect and prevent improper conduct.

- Timely disclose to the agency Office of the Inspector General, with a copy to the contracting officer, whenever the contractor has credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).
- The rule also provides the following as causes for suspension or debarment: knowing failure by a principal until 3 years after final payment on the contract, to timely disclose to the Government credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; violation of the civil False Claims Act; or significant overpayments(s) on the contract, other than overpayments resulting from contract financing payment as defined in FAR 32.001, Definitions.

See Section 8, Questions and Answers, for further information.

3. Effective Date. Date of signature.
4. Termination Date. This IL expires one year from the effective date unless cancelled, extended, or incorporated into a handbook.
5. Applicability. This IL applies to all GSA/FAS and VA activities awarding and administering Federal Supply Schedule contracts.
6. Reference Regulations. FAR Parts 2, 3, 9, and 42 are revised, and a new clause, 52.203-13, Contractor Code of Business Ethics and Conduct, is prescribed. For the acquisition of commercial items, the clause is incorporated by reference in FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.
7. Instructions
 - A. Refresh all Federal Supply Schedule solicitations and modify all Schedule contracts to incorporate clause 52.203-13, Contractor Code of Business Ethics and Conduct.
 - i. Applicability:
 - The statute and subsequent rule defined a covered contract to mean any contract in an amount greater than \$5,000,000 and more than 120 days in duration. For the purpose of determining applicability of this clause to the Schedules Program, GSA considers the total value of the acquisition to be the estimated dollar value of *the entire Schedule* inclusive of all options. Since the estimated dollar value of each Schedule exceeds \$5,000,000, and a contract base period exceeds 120 days, every Schedule solicitation and resulting contract shall include FAR 52.203-13, Contractor Code of Business Ethics and Conduct (prescription at FAR 3.1004(a)).
 - FAR 52.203-13(c) outlines the requirement to have a formal business ethics awareness, compliance program, and internal control system. However, this requirement does not apply if the Contractor was awarded as a small business concern or if the contract is for the acquisition of a commercial item as defined in FAR 2.101. Schedule contracts are for the acquisition of

commercial items; therefore, Schedule contractors are not required to comply with this requirement.

- ii. **Solicitation Refresh:** During the next scheduled solicitation refresh, insert the current version of FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, which incorporates FAR 52.203-13, Contractor Code of Business Ethics and Conduct, by reference into all Schedule solicitations. The Solicitation Writing System (SWS) will mark this clause as required for all Schedule solicitations.
- iii. **Contract Modification:** Schedule contracts shall be modified to incorporate by reference FAR 52.203-13 (see Appendix A for full text) into the current version of FAR 52.212-5. The effective date for existing Schedule contracts will be the date of the modification that incorporates the clause into the contract.

8. Questions and Answers.

What impact do the new Ethics requirements have on a Schedule contractor?

There are only two requirements of the clause that apply to Schedule contracts: 1) a written code of business ethics and conduct and 2) mandatory disclosure. Because Schedule contracts are for the acquisition of commercial items, the requirement for a business ethics awareness and compliance program, and internal control system, is not applicable. However, generally, Schedule contractors are encouraged to develop and maintain a business ethics awareness and compliance program, and internal control system, to help ensure compliance with their contract.

The written code of business ethics and conduct must be made available to each employee engaged in performance of the contract. The Contractor is also required to exercise due diligence to prevent and detect criminal conduct and otherwise promote an ethical and lawful organizational culture.

The mandatory disclosure requirement requires timely disclosure to the agency Office of the Inspector General, with a copy to the contracting officer, when the contractor has credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.

Does the new rule prescribe certain ethical standards that need to be met?

No. The rule reflects minimum expectations and merely provides a framework for ethics management and disclosure. Firms are free to establish the highest ethical standards they consider to be appropriate and suitable given the size of the firm and extent of the firm's involvement in government contracting.

Does the Schedule Procuring Contracting Officer (PCO) need to require any documentation from the contractor to support compliance with a written code of conduct?

No. In accordance with 52.203-13(b)(i)(ii), the Contractor must have a written code of business ethics and conduct that is made available to each employee engaged in the

performance of the contract within 30 days of contract award. A copy of the code does not need to be provided to the Schedule PCO; however, the Schedule PCO and other entities, such as the Inspector General, may require a copy of the code as part of a responsibility determination in exercising the contract option, a formal audit, etc.

The rule revises FAR Subpart 9.4—Debarment, Suspension, and Ineligibility. What was revised, and does enforcement apply only after the FAR changes were made?

A disclosure requirement was added as a "new" cause for suspension and debarment.

In accordance with FAR 9.406-2 Causes for debarment, and 9.407-2 Causes for suspension, a contractor may be suspended or debarred for:

- (vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—
 - (A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - (B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
 - (C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

The new revisions in FAR Subpart 9.4 require that contractors disclose the violations above whether or not the clause at 52.203-13 is applicable and/or the violations occurred prior to the effective date of the FAR changes. See FAR 3.1003(a)(2).

Who is required to be notified?

If the violation relates to an order against a Schedule contract or any other procurement vehicle intended for use by multiple agencies, the contractor must notify the Office of Inspector General of the ordering agency, the Office of Inspector General of the agency responsible for the basic contract, the contract level contracting officer and the ordering level contracting officer.

Are there agency procedures for disclosure by the contractor to the Government?

Yes. A GSA Acquisition Letter V-09-05, Contractor Fraud Disclosure Requirements, was issued from the GSA Office of the Chief Acquisition Officer on May 27, 2009. The AL establishes agency procedures pursuant to FAR 3.1003(b). Please refer to the AL for further information.

What is considered 'credible evidence' and 'timely disclosure'?

'Credible evidence' implies that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government. 'Timely' is defined based on the examination of credible evidence. The contractor need only take reasonable steps that the contractor considers sufficient to determine that the evidence is credible. There is no time limit that is defined in terms of

number of days.

What impact do the new ethics requirements have on other contractual matters, e.g. determining responsibility?

A contractor's satisfactory record of integrity and business ethics has long been one of the required elements for determining that a prospective contractor is responsible (FAR 9.104-1 (d)). The code of conduct now required by the contract clause provides a basis for evaluating a firm's responsibility, including special standards of responsibility when appropriate. A cross reference is also included in FAR Part 42 to promote the inclusion of business integrity in past performance. See FAR 42.15.

Is information submitted by the contractor to the Government as part of a mandatory disclosure subject to public release pursuant to a Freedom of Information Act (FOIA) request?

The Government, to the extent permitted by law and regulation, will safeguard and treat information as confidential where the information has been marked "confidential" or "proprietary" by the company. The information will not be released to the public in response to a FOIA request without prior notification to the Contractor. The Government may transfer documents to other departments or agencies within the Executive Branch if the information relates to matters within the organization's jurisdiction.

The rule references FAR 3.1004 and prescribes clause 52.203-14, Display of Hotline Poster(s). Does this requirement apply to Schedule contracts?

No. This clause does not apply to contracts for the acquisition of commercial items or those that will be performed entirely outside the United States. Since the Schedules contracts are for the acquisition of commercial items, this clause is not prescribed into Schedule contracts.

Appendix A

52.203-13 Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004(a), insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DEC 2008)

(a) Definitions. As used in this clause—

"Agent" means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

"Full cooperation"—

- (1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;
- (2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—
 - (i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

- (ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from—

- (i) Conducting an internal investigation; or
- (ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

"Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

"United States," means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct.*

- (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—
 - (i) Have a written code of business ethics and conduct; and
 - (ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall—

- (i) Exercise due diligence to prevent and detect criminal conduct; and
- (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

- (3) (i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

- (ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

- (iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

- (c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

- (1) An ongoing business ethics awareness and compliance program.
 - (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.
 - (ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.
- (2) An internal control system.
 - (i) The Contractor's internal control system shall—
 - (A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and
 - (B) Ensure corrective measures are promptly instituted and carried out.
 - (ii) At a minimum, the Contractor's internal control system shall provide for the following:
 - (A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.
 - (B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.
 - (C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—
 - (1) Monitoring and auditing to detect criminal conduct;
 - (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
 - (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.
 - (D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.
 - (E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.
 - (F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).
 - (1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.
 - (2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply

Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts.*

(1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of \$5,000,000 and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.